

Singh (Migration) [2017] AATA 3116 (20 June 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Sanjay Singh
CASE NUMBER:	1601392
DIBP REFERENCE(S):	CLF2012/9452 OSF2008/006462
MEMBER:	Chantal Bostock
DATE:	20 June 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Statement made on 20 June 2017 at 10:25am

CATCHWORDS

Migration – Partner (Migrant) (Class BC) visa – Subclass 100 (Spouse) - Federal Magistrates' Court remittal – Whether a genuine spousal relationship exists – Applicant did not attend hearing – Lack of evidence of genuine spousal relationship – Adverse allegations against the applicant – Decision affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 65, 359A, 375A

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cl 100.221(2)(b)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 20 January 2012 to refuse to grant the visa applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 4 August 2008 on the basis of his relationship with his sponsor. At that time, Class BC contained two subclasses: Subclass 100 (Spouse) and 110 (Interdependency). The applicant has made claims only for the Subclass 100 visa and does not claim to be in an interdependent relationship as required by Subclass 110.
3. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Relevantly to this matter, the primary criteria include cl.100.221(2)(b).
4. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The applicant, a citizen of Fiji, married the sponsor, an Australian citizen, on 4 October 2003. On the basis of their relationship, the applicant was granted a subclass 309 visa in 2009 and he travelled to Australia in 2009. The Department began to process the second stage of the applicant's visa application. In 2011, the Department conducted a home visit at the parties' address during which the sponsor's daughter denied any knowledge of the applicant and stated that her mother was single. The Department subsequently held an interview with the parties, following which the delegate found that there were many inconsistencies in the parties' responses. On 20 January 2012, the Departmental delegate found that the relationship between the parties was not genuine and refused the subclass 100 visa application on the grounds that the applicant did not meet cl. 100.221. The Departmental delegate found that overall, the parties had provided little convincing evidence that their relationship was genuine and continuing.
6. The applicant lodged a review application with the Migration Review Tribunal (MRT). The applicant lodged material in support of his application including the following: a one-page joint CBA bank statement covering the period of August 2011 until November 2011; correspondence addressed to the parties and photographs of the parties together.
7. Following the hearing, the previous Tribunal wrote to the applicant under s 359A of the Migration Act, putting to him the information provided by the sponsor's daughter at the home visit and the inconsistencies in the parties' responses at the Departmental interview and during the hearing. The applicant responded to the s 359A letter and requested copies of all his documents. In due course, the previous Tribunal did not accept that the parties were in "a genuine and continuing relationship" and affirmed the decision.
8. The applicant appealed. On 18 March 2015, the Federal Magistrates' Court ordered that the matter be reconsidered on the basis that the applicant's request for access to documents was not met, thereby constituting a breach of the Tribunal's procedural fairness obligations: *Singh v Minister for immigration & Anor* [2015] FCCA 533. The applicant's review application was reconstituted to the present Tribunal.

9. On 8 August 2016, the applicant was invited to attend a hearing on 9 November 2016. On 3 November 2016, the applicant wrote to the Tribunal stating, amongst other things:

10. I have been hurt from the last hearing as well as my partner, Ms Henry. We were both very happy that the Federal Court made a decision in our favour. My partner and I are not happy to attend another hearing and for that reason we ask that the Tribunal consider the application based on the previous evidence and evidence on file.

11. The hearing was cancelled on 7 November 2016, given the applicant's abovementioned correspondence and that the applicant had not received access to written documents. On 17 November 2016, the applicant was provided with access to the written material on the Department's and Tribunal's files.
12. On 21 November 2016, the Tribunal sent the applicant an additional s 359A letter, requesting his comment on or response to an allegation, which stated that the applicant took a girl to a hotel for sex under the pretence of marriage in 2008. In addition, the Tribunal put to him that he did not list the sponsor or her minor children as dependants on his fee waiver/reduction application lodged with the Tribunal. The applicant's undated response, received by the Tribunal on 15 December 2016, denied that he took a girl to have sex in a hotel. In relation to the fee waiver application, he stated that he was not aware that he had not listed his wife or minor children.
13. In a telephone call with an officer of the Tribunal on 6 January 2017, the applicant requested a copy of the abovementioned allegation. The Tribunal officer informed the applicant that he would not be given a copy of the allegation as it was non-disclosable. The officer agreed to provide the applicant with a copy of his fee waiver application, as per his request. The applicant informed the officer that he wished to have the matter determined on the papers. He was asked to put his instructions in writing to the Tribunal.
14. On 7 January 2017, the applicant wrote to the Tribunal stating as follows:
- 15. I again deny any false allegation and request that the Tribunal provide a copy of the allegation to me in writing...As I told you I expect the Tribunal to put any adverse information or any further questions to me so that I will respond to it because I believe that the Tribunal has no adverse information against me and my wife unless you have something in writing which I request.*
16. A number of telephone calls between the applicant and the Tribunal ensued as there was confusion and uncertainty relating to whether the applicant wished to attend a hearing. On 19 January 2017, the Tribunal wrote to the applicant advising that it had considered all the material before it relating to his application but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing on 10 March 2017. The Tribunal also requested that the sponsor attend the hearing.
17. On 12 January 2017, the applicant advised the Tribunal in writing that he did not wish to give oral evidence and consented to the Tribunal proceeding to make a decision on the review without taking any further action to allow or enable him to appear before it. This matter has therefore been determined on the evidence available to the Tribunal.
18. On 31 May 2017, the Tribunal wrote again to the applicant under s 359A of the Migration Act, putting to him adverse information received by the Tribunal in November 2016. The essence of the allegation was that the parties were not living together and the applicant has a girlfriend who has recently arrived from Fiji.

19. On 1 June 2017, the applicant's authorised recipient, Mr Laba Sarkis informed the Tribunal that he could not contact the applicant but had forwarded the correspondence from the Tribunal on to the applicant's home address. Mr Sarkis further stated that he was travelling overseas from 2 June 2017 and would return on 17 June 2017 and requested an extension of time to respond the correspondence so that he could discuss the matter with the applicant. On 14 June 2017, the Tribunal declined Mr Sarkis' request. A further request was made for an extension of time, which was once again refused. The Tribunal notes that Mr Sarkis is the applicant's authorised recipient and not the applicant's representative.
20. Furthermore, the Tribunal notes that the Departmental files contain three certificates under s 375A of the Migration Act. On 31 May 2017, the Tribunal wrote to the applicant, informing him of the existence of these certificates and that it was satisfied that the certificates were valid as the material contained in the certificates related, amongst other things, to third parties, giving rise to privacy and confidentiality obligations. The Tribunal further notes that information protected by these certificates has been put to the applicant either at the previous Tribunal hearing or under s 359A of the Migration Act.
21. The issue in the present case is whether the parties are in a spouse relationship as at the time of decision.

SPOUSE (cl.100.221(2)(b), (2A)(b))

Whether the parties are in a 'spouse' relationship

22. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, amongst other things, that at the time of this decision, the applicant is the spouse of the 'sponsoring spouse'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring spouse' is the person who was specified as the applicant's spouse or intended spouse in the related Subclass 309 application. In the present case the applicant claims to be the spouse of the sponsor, a 'sponsoring spouse' within the meaning of that term.
23. 'Spouse' is defined in r.1.15A of the Regulations and provides that a person is the spouse of another where the two persons are either in a married or de facto relationship. Persons are in a de facto relationship if they are not validly married to each other. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: r.1.15A(1A). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

24. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 4 October 2003. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by r.1.15A(1A)(a).

Are the other requirements for a spousal relationship met?

25. Financial aspects of the relationship – The Tribunal carefully reviewed the material relating to the parties' finances on the files, including the parties' joint bank statement dated 2011.

There is no evidence that the parties have joint ownership of assets, joint liabilities and any joint legal obligations. Furthermore, there is no evidence that the parties pool financial resources or share day-to-day household expenses.

26. Nature of the household – At the previous Tribunal hearing, the parties claimed to live together with the sponsor's two youngest children. No further material relating to the parties' current living arrangements has been provided to the Tribunal. There is no evidence that the parties enjoy joint responsibility of the sponsor's children and share housework.
27. Social aspects of the relationship – The Tribunal notes that the applicant submitted to the previous Tribunal member photographs of the parties together and a wedding invitation. There is no evidence that the parties represent themselves as a couple or plan and undertake joint social activities. Furthermore, there is no evidence that the parties are seen as a couple.
28. Nature of persons' commitment to each other - The Tribunal notes that the parties married in 2003 and that the applicant was granted a subclass 309 visa in 2009 and travelled to Australia in 2009. It considered the applicant's letter dated 14 February 2014 to the previous Tribunal member, in which he stated that the parties' relationship was genuine "in all aspects" and that "as a matter of fact, my wife and I love each other and as a result of not being accepted by one of her daughters I have had some difficulties but that does not mean that the relationship with both of us is not genuine". Furthermore, he stated that neither party was educated and smart, resulting in difficulties in convincing the Department of the genuine nature of their relationship. Their love, however, could not be denied. He noted that the Australian Embassy in Fiji was satisfied that their relationship was genuine and asked that the Tribunal disregard any allegations. In his letter to the present Tribunal dated 3 November 2016, the applicant stated that his relationship was "long term". The Tribunal, however, placed significant weight on the parties' decision to not attend the hearing and the fact that neither party has given evidence relating to the present circumstances of their relationship. Furthermore, no recent, written material relating to their relationship has been submitted to the Tribunal. The Tribunal has taken into account the applicant's explanation for not attending the hearing, namely that they were "emotionally down" and harmed as a result of the first hearing. Given the critical importance of the hearing to the process and the lack of current material attesting to their relationship, the Tribunal would nevertheless expect the parties to attend the hearing and does not accept their explanation for failing to attend.
29. Any other relevant considerations- As noted earlier, the Tribunal notes that very little material relating to the parties' relationship was submitted to the previously constituted Tribunal member or the present Tribunal. The Tribunal placed weight on the Department's home visit in 2011, in which the sponsor's daughter stated she did not know the applicant and that the sponsor was single. The present Tribunal did not accept the applicant's previously given explanation that he had problems with the sponsor's daughter and that he would go and stay with his brother. The Tribunal also placed weight on the December 2016 allegation that the parties are not living together and the applicant has a girlfriend who has recently arrived from Fiji.
30. Having considered the four abovementioned factors, the lack of recent, independent evidence attesting to their relationship and the unwillingness of the parties to attend the hearing, on the evidence before it, at the time of decision, the Tribunal is not satisfied that the parties have a mutual commitment to shared life to the exclusion of others, a genuine and continuing relationship and live together / not separately and apart on a permanent basis: r.1.15A(1A). Therefore the applicant does not meet cl.100.221(2)(b). There is no evidence before the Tribunal that the alternative criteria in cl.100.221(3) and (4) (death, family violence, child exceptions) are met.

31. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

32. The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Chantal Bostock
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

...

- (3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:
- (ad) a Partner (Migrant) (Class BC) visa; or
 - (ae) a Partner (Provisional) (Class UF) visa; or
 - (af) a Partner (Residence) (Class BS) visa; or
 - (ag) a Partner (Temporary) (Class UK) visa;
- the Minister must have regard to all of the circumstances of the relationship, including, in particular:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses;
 - (b) the nature of the household, including:
 - (i) any joint responsibility for care and support of children, if any; and
 - (ii) the parties' living arrangements; and
 - (iii) any sharing of responsibility for housework;
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities;
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).
- (5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.